the promise from the third person he could not under s 42 of the Contracts Act 1950 enforce it against the respondent'. The headnote in this case reads as follows:

> In this case the appellant had transferred his land to the respondent and the respondent had transferred her land to the appellant. The appellant's case was that the consideration for the transfer of his land was $25,000 and that for the respondent's land was $14,000, thereby leaving a balance of $11,000 which was agreed to be settled by (a) Nik Hassan $4,000 and (b) Nik Abdul Majid Yahya $7,000. Both Nik Hassan and Nik Abdul Majid were the sons of the respondent. Nik Abdul Majid did not settle the sum of $7,000 as agreed and the appellant thereupon claimed payment from the respondent. His claim was dismissed in the High Court and he appealed to the Federal Court.

In delivering the judgment of the Federal Court, Ali FJ said, inter alia, as follows:

> The effect of the said agreement, as it seems to me, is that upon the appellant's acceptance of Nik Abdul Majid's promise to pay or settle the amount $7,000 the respondent was discharged from liability to pay. The law here, in my view, is the same as in India. I am referring of course to s 42 of the Contracts (Malay States) Ordinance 1950 which is ... the same as s 41 of the Indian Contract Act. The commentary on the said provision in *Pollock and Mulla* (9th Ed) at p 361 seems to suggest that the law in England is different.

It is true that the respondents had obtained two judgments by default of appearance — one in the sessions court and one in the High Court — but the letter of 27 May 1985 refers to the total sum obtained by way of default of appearance in both the judgments in the sessions court as well as in the High Court so that s 42 of the Contracts Act 1950 applied to the total sum.

We are of the view that the learned judge failed to give due regard to s 42 of the Contracts Act 1950. The case of *LYL Hooker Sdn Bhd*[2] referred to by the learned judge dealt with the question of novation and assignment. In that case, s 42 of the Contracts Act 1950 was not in issue and hence was not considered by the High Court nor by the Federal Court. In the present appeal before us, counsel for the appellant relied strongly on s 42 of the Contracts Act 1950 and we agree with him that by virtue of the appellant's letter of 27 May 1985, the provisions of s 42 applied and therefore the respondents having accepted the performance of the appellant's obligation to pay his debt to them by a third party, namely, Hock Hin Leong Sdn Bhd, the respondents were precluded from enforcing the judgment debt against the appellant. The question of assignment and novation therefore did not arise in this case. In the circumstances, therefore, we held that the respondents were not entitled to enforce the default judgments against the appellant. The consequential execution by way of bankruptcy notice and bankruptcy petition was bad and irregular. We accordingly allowed the appeal with costs and set aside the bankruptcy notice and the bankruptcy petition.

On the view that we took in this appeal in relation to s 42 of the Contracts Act 1950 we did not find it necessary to consider the first point taken by the appellant that the sum mentioned in the bankruptcy notice and in the bankruptcy petition was in excess of the actual amount due.

Appeal allowed.

Solicitors: *Khong & Son; Lee Fam & Wong.*

Reported by *Prof Ahmad Ibrahim*

Nira Sdn Bhd v Malayan Banking Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 538 OF 1988
ABDUL HAMID LP, MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
21 SEPTEMBER 1989

Land Law — Charge — Application for sale of charged land — Need to show default by chargor — National Land Code 1965, ss 256 & 257

In this case, the respondent had applied for an order for the sale of the lands charged by the appellant to them to satisfy the whole of the sum secured by the said charges which was due to the respondent. The manager of the respondent's main office had stated the total balance sums due to the respondent and had indicated that the monthly interest had been rightly calculated and no reply had been given by the appellant. Earlier, the respondent had demanded payment of the whole outstanding balance on the charges, and on failure to comply, the respondent had caused a statutory notice to be issued requiring the appellant to remedy the breach within a period of seven days from the date of receipt of service. The appellant received the notice but failed or neglected to remedy the said breach. On the evidence, the learned trial judge made the order that the lands be sold by public auction to satisfy the sums due to the respondent. The appellant appealed.

Held, dismissing the appeal:

On the evidence adduced, the respondent had, on its application, satisfied the court that the prior requirements of the law for an order for sale by the court have been complied with and that the default has been made by the appellant. The learned judge was therefore correct in making the order that the lands in question be sold by public auction under s 256 of the National Land Code 1965 to satisfy the sums due to the respondent.

Case referred to

1 *Chettiappah Chetty* v *Raja Abdul Rashid* (1931-32) FMSLR 345 (folld)

Legislation referred to

National Land Code 1965 ss 256, 257

Appeal from: Originating Summons No S5-31-1927-87 (High Court, Kuala Lumpur)

K Chandra for the appellant.
SM Yoong for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): Nira Sdn Bhd ('the appellant') had appealed against an order of the High Court at Kuala Lumpur made under s 256 of the National Land Code 1965 that the lands held under Geran No 4365 and CT No 22086 for lot nos 35327 and 4554 respectively, mukim of Kuala Lumpur and charged to Malayan Banking Bhd ('the respondent') under the Wilayah Persekutuan Register of Charges presentation no 12,810/82, jilid 264, folio 62 and presentation no 18, 715/82, jilid 275, folio 166, be sold by public auction on 10 March 1989 to satisfy the whole sum secured by the said charges which was due to the respondent as at 31 October 1988.

According to Mr K Chandra, counsel for the appellant, the main grounds of appeal were the following ground nos 2 and 3 in the memorandum of appeal:

> 2 The learned judge erred in law and in fact in holding that there was a sum of $17,339,452.43 due on the term loan as at 31 October 1988 and a sum of $2,571,605.96 due on the overdraft.
>
> 3 The learned judge ought to have held that there was an error by the respondent in the calculation of the interest on the term loan.
>
> Section 2.07(b) of the exh MBB-1 states: 'The interest chargeable between the date on which the full amount of the term loan shall have been disbursed advanced or paid as aforesaid and the anniversary date of which full disbursement of the term loan next following shall be calculated on the full amount of the term loan and all other sums then payable by the chargor shall be deemed to be due forthwith upon such date.'
>
> Section 2.07(c) states: 'In and for each succeeding year thereafter interest shall be calculated on the total amount of the moneys due to the bank hereunder (whether for principal or interest) as at the last day of the preceding year and shall be deemed to be due on the first day of the year in respect of the year then commencing.'
>
> The respondent/plaintiff has calculated the interest on the balance outstanding at the end of each month.

With respect to the contention of counsel on ground 2 above, it must be pointed out that the manager of the respondent's Kuala Lumpur main office had affirmed an affidavit on 27 October 1988, stating that the total balance sums due to Malayan Banking Bhd as at 31 October 1988 were as follows:

(i) Term loan account

$17,339,452.43 particulars of which are as follows:

Outstanding principal as at 30 June 1984	$ 7,929,779.23
Total overdue interest (26 June 1982 to 30 June 1984)	$ 2,515,462.19
Outstanding sum due as at 30 June 1984	$ 10,445,241.42
add total overdue interest from 1 July 1984 to 31 October 1988	$ 5,197,551.56
Sub-total:	$ 15,642,792.98
add total penalty interest from 1 July 1984 to 31 October 1988	$ 1,696,659.45
amount due as at 31 October 1988	$ 17,339,452.43

From 1 November 1988 interest at the default rate per annum of 1% plus prescribed rate (4% pa + BLR) on $15,642,792.98 shall be added to the outstanding sum of $17,339,452.43 to the date of full payment; and

(ii) Overdraft account

$2,571,605.96 with interest thereon at the rate per annum of 4% + BLR and at an additional 1% per annum on the overdraft in excess of the approved limit of $2m, both with monthly rests from 1 November 1988 to the date of full payment.

There was, however, no reply by the appellant to that affidavit and in the circumstances we could not see how the learned judge could have come to any other finding except to hold that a sum of $17,339,452.43 was due on the term loan account as at 31 October 1988 and a sum of $2,571,605.96 was also due on the appellant's overdraft account on that date.

As regards ground 3 above, we again noted that the manager of the respondent's Kuala Lumpur main office had, in another affidavit dated 23 August 1988, denied that there was an error in the computation of interest for the term loan as alleged by one Tan Kim Seng, the finance manager of the appellant in his affidavit affirmed on 21 April 1988. The said manager pointed out that the appellant had written to the respondent and had asked the respondent to work out the amount of monthly interest for it (ie the appellant). The respondent in response to the appellant's said request calculated the monthly interest for it. He also pointed out that the interest on the term loan was calculated in accordance with ss 2.05 and 2.07 of the charge instrument, and has produced as exhibits the various notices of variations of interest given by the respondent to the appellant. Again there was no reply by the appellant to that affidavit of the respondent's manager. There were therefore no merits in the above grounds of appeal raised by the appellant.

In conclusion, we were of the view that although s 257(1)(c) of the National Land Code 1965 provides that every order for sale made by the court under s 256 shall 'specify the total amount due to the chargee at the date on which the order is made' and therefore requires a chargee to show the court the total amount due to it at the date on which the court makes the order, yet we considered that for the purpose of enabling any chargee to obtain the sale of a land or lease to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein, the essential requirements of the law are that there be compliance with the

provisions of s 254 or s 255 of the National Land Code 1965. In this case we observed that the respondent had by a letter dated 3 March 1987, through its solicitors Shook Lin & Bok, demanded of the appellant within seven days from the date thereof payment of the whole outstanding balances on the appellant's first and second charges. The appellant received the said letter but failed and or neglected to pay the sums due, and accruing interest thereon or in part thereof within the periods specified and had thereby committed a breach of one of the terms of the said charges. The said breach committed by the appellant of the term of the said charges having continued for a period of more than seven days, the respondent through its solicitors then caused a statutory notice of default in Form 16D of the National Land Code 1965, dated 21 March 1987, to be issued requiring the appellant to remedy the said breach within a further period of seven days from the date of receipt of service thereof, failing which an order for sale would be applied for. The said notice was received by the appellant on or about 21 March 1987, but it failed and or neglected to remedy the said breach. It should be mentioned here that by s 8.01 of the annexure to the said charges it has been provided that:

> A demand for repayment of the moneys hereby secured or the balance thereof together with interest thereon and any other moneys due as aforesaid under any of the provisions of s 8.01 hereof may be made by a notice demanding payment within seven (7) days from the date of notice. Service of such notice shall be effected in the same manner as provided in s 12.01 hereof.

On the evidence adduced, the respondent had on its application satisfied the court that the prior requirements of the law for an order for sale by the court have been complied with, and that default has been made by the appellant. The learned judge was therefore correct in making the said order that the lands in question be sold by public auction under s 256 of the National Land Code 1965 to satisfy the sums due to the respondent.

In this context we would consider it relevant to refer to the following passages in the judgment of the former FMS Court of Appeal concerning the exercise by a chargee of his remedy under the provisions of the former Land Code 1926, where default in payment has been made by a chargor, delivered by Thorne Ag CJ (as he then was) in *Chettiappah Chetty* v *Raja Abdul Rashid*[1] at p 347 in which his Lordship said as follows:

> By s 149 of the Land Code, it is provided that, after establishing the default on the part of the chargor in accordance with the provisions of the earlier sections of the Code, it shall be lawful for the chargee by summons to call the proprietor of the charged land to show cause why the land should not be sold by public auction under the direction of the court.
>
> It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that a default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.

In this case, having satisfied ourselves that the requirements of the law under the provisions of the National Land Code 1965 have been complied with and that default has been made by the chargor, we therefore did not consider it necessary to call upon Miss Yoong, counsel for the respondent, to reply and dismissed the appeal with costs and ordered that the deposit be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *K Chandra & Co*; *Shook Lin & Bok.*

Reported by *Prof Ahmad Ibrahim*

Minister of Labour, Malaysia v Sanjiv Oberoi & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 385 OF 1987
ABDUL HAMID LP, MOHAMED YUSOFF AND AJAIB SINGH SCJJ
29 AUGUST 1989

Administrative Law — Certiorari — Decision of Minister of Labour not to refer representations to Industrial Court — Whether Minister required to give reasons — Industrial Relations Act 1967, s 20(3)

Labour Law — Decision of Minister of Labour not to refer representations to Industrial Court — Whether Minister required to give reasons — Industrial Relations Act 1967, s 20(3)

The first respondent was employed by the second respondent, Genting Bhd, as executive food and beverage manager on a two-year contract with effect from 1 March 1985. On 23 June 1986 the second respondent terminated the contract with two months' salary in lieu of notice. The first respondent made representations to the Director-General for Industrial Relations for reinstatement in his former employment. Steps taken to effect a settlement failed. The Director-General referred the matter to the Minister of Labour. The Minister, after considering the report of the Director-General and in the exercise of his discretion under s 20(3) of the Industrial Relations Act 1967, decided not to refer the representations to the Industrial Court. The first respondent applied for certiorari, and the learned judge who heard the application held that the Minister in exercising his discretion must state his reasons on the facts of each particular case and he directed the Minister to file a further affidavit stating his reasons why the matter was not referred to the Industrial Court. The Minister of Labour appealed.

Held, allowing the appeal:

(1) The order for further affidavit should only be given in